

1 memory is that it's in 40s. So you're
2 comparing apples to oranges.

3 Q The average, let me just see if we
4 can do it this way. The average for, a
5 straight average, what's called a simple
6 average for all of the DMAs.

7 That is if I just took each region
8 of the country, the whole 200, for which an
9 average exists, and I said, what's the average
10 of all those, you'd get , right?

11 A If you took a simple average,
12 which presumes that Comcast customers are
13 evenly distributed across those DMAs, which is
14 a horrible, horrible assumption to make, then
15 you would get or or whatever you got.

16 Q Just answer the question. If you
17 did a simple average of all of the market
18 shares, nationwide, you would get ,
19 correct?

20 A I have no reason why I would ever
21 do that. I can't even think of an occasion to
22 do that.

1 MR. CARROLL: Your Honor, may the
2 witness be directed to answer the question?

3 THE WITNESS: I'll answer --

4 MR. PHILLIPS: I think he's
5 already answered it a couple of times, Your
6 Honor.

7 ADMIN. JUDGE SIPPEL: Wait just a
8 second now, I'm going to direct the witness,
9 listen to the question, but I'm going to
10 direct Mr. Carroll, let him answer the
11 question. Don't interrupt him.

12 MR. CARROLL: I'm fine to do that,
13 as long as he's answering it, Your Honor.

14 ADMIN. JUDGE SIPPEL: Well, it's
15 not an either or, this can't work, the
16 Reporter can't even work with this. Let's go
17 ahead, ask it again, sir.

18 BY MR. CARROLL:

19 Q It's a very simple question. If
20 you calculated a simple average for all the
21 market shares nationwide that are listed in
22 Kagan, if you just took them and you computed

1 the average for Comcast, the way they're
2 listed, straightforward simple, you would get
3 , is that correct?

4 A Absolutely.

5 Q And the way you did it, with your
6 approach that has you averaging, including
7 some averages multiple times, you came up with
8 averages of and , correct?

9 A Yes, which actually bounds
10 Comcast's actual market share in the markets
11 that Comcast serves.

12 When you include DMAs that Comcast
13 doesn't exist in, you're going to get the
14 number that we keep talking about.

15 out of every nationwide are Comcast
16 subscribers.

17 But what this analysis is doing,
18 in contrast, is looking at Comcast carriage
19 decisions in the markets that it serves.

20 It's not looking at Comcast
21 carriage decisions and markets that it doesn't
22 serve. And that's the disconnect that we're

1 having right here.

2 Q Well, let me follow up that answer
3 with this. Now, did you include all the data
4 when you ran the average for Comcast? All the
5 data about market share?

6 A I'm not sure what you mean by all.
7 I had to merge two databases, so any head end
8 that I could map into the DMA database, the
9 instructions were to pull that data.

10 Q Did you exclude a whole bunch of
11 them?

12 A I can't recall excluding a whole
13 bunch of them. You mean because --

14 Q Did you exclude --

15 A Hold on --

16 Q -- a whole bunch of head ends from
17 the work that you did, yes or no?

18 A I don't recall doing that.

19 Q Did you exclude all of the head
20 ends from your analysis for which Comcast
21 wasn't carrying Tennis Channel at all?

22 A Wasn't carrying Tennis Channel at

1 all?

2 Q Correct, sir. You excluded them
3 from your average, didn't you?

4 A I excluded them from the sample
5 because I was looking at what explained the
6 variation in the carriage decision between the
7 sports tier and something more highly
8 penetrated.

9 Q Just answer my question. You
10 chose to exclude all of those when you
11 calculated your average, is that right? Yes
12 or no?

13 A For the analysis that I performed,
14 yes. I wasn't looking at Comcast comparisons
15 in those markets where it didn't carry Tennis.

16 Q And the ones that Comcast wasn't
17 carrying in, those are the same markets, same
18 DMAs where Comcast is carrying, right?

19 You have DMAs where they're doing
20 both things, don't you?

21 ADMIN. JUDGE SIPPEL: You asked
22 him two questions.

1 BY MR. CARROLL:

2 Q I'll simplify it. In a lot of
3 these DMAs, don't you have head ends that are
4 doing, that are going in opposite directions.
5 Some are carrying, some aren't carrying?

6 A Within a DMA? It's possible, yes.

7 Q Okay. And you chose to exclude
8 the ones where Comcast wasn't carrying and
9 only include the other ones in your
10 calculation, correct?

11 A For the purpose of what I was
12 doing, absolutely, I excluded those.

13 Q And mathematically, that's the
14 same as if you excluded all the zeros when
15 you're calculating an average?

16 A No.

17 Q All of the ones where they're not
18 carrying, is the same as if it was a zero,
19 correct?

20 A No.

21 Q What number would you assign to
22 it?

1 A I don't know, because I wasn't
2 looking at those head ends.

3 Q You chose not to look at the ones
4 where they weren't being carried. But if
5 you're doing an honest, objective average of
6 market share, and of what Comcast is doing in
7 the marketplace, shouldn't they be included?

8 A I don't know what you mean by the
9 word honest. I'm trying to ascertain or do an
10 analysis of Comcast market share in two
11 different comparison groups.

12 The first group is when they carry
13 Tennis on the sports tier and the second group
14 is when the carry Tennis Channel more broadly.

15 You're pulling up a third group.
16 That's an interesting analysis, I did not
17 perform that analysis. Perhaps you could
18 convince me that that's another analysis that
19 I should have performed.

20 ADMIN. JUDGE SIPPEL: Can you
21 explain what it is that you did not do? You
22 said you did two, but not the third one?

1 THE WITNESS: He's pointing out
2 that there are three groups. He's absolutely
3 right on this fact that Comcast can do three
4 things with respect to Tennis Channel, at a
5 given head end.

6 It can carry them on the sports
7 tier, it can carry them more broadly, or it
8 can carry them not at all. Okay?

9 What I wanted to do was to
10 determine whether or not Comcast market share
11 could explain the variation between these two
12 choices.

13 It is, I'm looking at degrees of
14 carriage. What Mr. Carroll is pointing out
15 correctly is that there's a third group which
16 is non-carriage. And, again, my methodology
17 is being driven, in part, by the FCC's
18 methodology where the FCC says can we exploit,
19 remember back at the FCC Report.

20 Can we exploit variations in the
21 degree of favoritism. I'm trying to get
22 exploiting variations in the degree of dis-

1 favoritism.

2 ADMIN. JUDGE SIPPEL: Are you
3 doing it in accordance with, if there is such
4 a standard, you know, acceptable economist
5 standards?

6 THE WITNESS: Well, sure, I mean,
7 I will acknowledge that there is a third group
8 and I just didn't, I didn't calculate Comcast
9 market share for that group.

10 But there is a third group which
11 doesn't carry it at all. What I'm not so sure
12 of sitting here today is how important that
13 group is in the sense that how often, and look
14 our sample --

15 MR. CARROLL: Would you like to
16 see?

17 ADMIN. JUDGE SIPPEL: Sure, yes.

18 MR. CARROLL: Last exhibit for
19 day, Your Honor.

20 ADMIN. JUDGE SIPPEL: Thank you.

21 MR. CARROLL: This is exhibit
22 1093.

1 (Whereupon, the document referred
2 to was marked as Exhibit Number
3 1093 for identification.)

4 ADMIN. JUDGE SIPPEL: Okay.

5 BY MR. CARROLL:

6 Q Sir, we put together a list of all
7 of the DMAs that have head ends with no
8 carriage that you did not include in the
9 averaging that you did.

10 And we put that list in front of
11 you. Do you have any reason to take exception
12 to the list? Does it look right?

13 A I have no reason to take exception
14 to it.

15 Q Did you even think about this when
16 you did your work, or is this something you're
17 now realizing, hey, there's an issue here?

18 A I don't think there is an issue
19 here. I think there's an interesting academic
20 inquiry here, but I don't think there's an
21 issue with what I did.

22 Q Did you think about this at all

1 when you were doing your work, yes or no?

2 A It's possible I thought about it.
3 Now we're a bit removed, let me just kind of
4 ponder this.

5 I think that what I had in my head
6 was I was trying to explain the difference
7 between sports tier, where sports tier is the
8 worse place that you could be.

9 That's what I had in my head, to
10 more broadly penetrate. You're introducing,
11 quite reasonably, that there's an even worse
12 place than the sports tier, which is no
13 carriage whatsoever. And I didn't do that.

14 Q You didn't do that. But my
15 question was you didn't even think about it,
16 did you?

17 A I think I thought about it but I
18 just haven't, I'm having very vague
19 recollections.

20 ADMIN. JUDGE SIPPEL: Well, that's
21 the best you can answer.

22 BY MR. CARROLL:

1 Q And you didn't make any disclosure
2 about this in your expert report you submitted
3 in this case, correct?

4 A About?

5 Q The fact that you had not included
6 this group?

7 A I think I did, I did make a
8 disclosure based on telling you which two
9 groups I focused on.

10 I was trying to be as careful as I
11 could in explaining the methodology and I
12 turned over my data and my STATA code to your
13 economist and there's nothing, there's nothing
14 that I'm trying to mislead or withhold here.

15 Q That was a few days ago, correct?

16 A Which one?

17 Q We had to request your data a few
18 days ago, do you remember that?

19 A No, there was a request that came
20 a few days ago, but, to be honest, the data
21 requests were going through Counsel to the
22 team and I'm not sure when things got turned

1 over entirely.

2 Q And the head ends that are listed
3 here, that were not included in the average --

4 ADMIN. JUDGE SIPPEL: What
5 document are we on now?

6 BY MR. CARROLL:

7 Q Exhibit 1093. There's an awful
8 lot of head ends here, isn't there?

9 A I don't know if, an awful lot is a
10 relative term. And so to say an awful lot,
11 I'd want to know --

12 ADMIN. JUDGE SIPPEL: Significant
13 number?

14 THE WITNESS: I can't tell the
15 significance until --

16 ADMIN. JUDGE SIPPEL: No, no, no,
17 that's a significant number of head ends.

18 THE WITNESS: Not necessarily,
19 because let me tell you, Your Honor, where I
20 was going.

21 ADMIN. JUDGE SIPPEL: Thank you.

22 THE WITNESS: Is what I want to

1 know is how many people are associated, how
2 many customers are associated with each one of
3 these head ends and what share of Comcast
4 total customers don't have Tennis Channel at
5 all.

6 My understanding, a casual
7 understanding, is that that would be a very
8 small share.

9 BY MR. CARROLL:

10 Q But that's a casual understanding.
11 You haven't analyzed any of this, have you?

12 A This third category --

13 Q You didn't analyze whether this is
14 statistically significant or not, did you?

15 A I did not look at this category,
16 no.

17 ADMIN. JUDGE SIPPET: And this
18 category being the head ends without carriage?

19 MR. CARROLL: Correct, sir.

20 THE WITNESS: Those that actually,
21 literally do not carry Tennis at all.

22 BY MR. CARROLL:

1 Q And do you know what the effect
2 would have been on your averages, if you had
3 included these head ends in the average
4 calculation?

5 A Well, I couldn't have included
6 them in the two categories that I came up
7 with, but it is conceivable that you could
8 come up with a third category which is worse
9 than the sports tier.

10 But I just, in my mind, the
11 benchmark was the sports tier, and just think
12 about the controversy here. They're trying to
13 get off the sports tier.

14 In my mind, the benchmark was the
15 sports tier and the comparator was a better
16 tier.

17 Q But you're trying to test for
18 whether there's a connection between the
19 market share that Comcast has and whether it's
20 carrying Tennis Channel, correct? Isn't that
21 correct?

22 A Not, no, not as she stated, no.

1 It's the degrees. I'm more interested in the
2 degree of carriage, conditional on carriage.

3 MR. CARROLL: Well, Your Honor,
4 it's 6:30, I don't want anybody to miss a
5 baseball game, hypothetically, if there is a
6 baseball game anyone is going to tonight.

7 ADMIN. JUDGE SIPPEL: I'll report
8 on it tomorrow morning. Why don't we just
9 wait until tomorrow morning and pick this up.

10 MR. CARROLL: That would be
11 excellent.

12 ADMIN. JUDGE SIPPEL: Okay, you
13 can talk with Counsel about the way you're
14 being treated on the witness stand, any of
15 that. But I'm going to ask Counsel not to
16 talk to him about, not to prep him for further
17 cross-examination, I guess that's what I'm
18 asking.

19 MR. PHILLIPS: Of course not.

20 ADMIN. JUDGE SIPPEL: Don't be
21 offended by that, please, don't. Please,
22 don't. But I want the witness to understand

1 that.

2 THE WITNESS: Yes, I won't.

3 ADMIN. JUDGE SIPPEL: Okay, nice
4 and fresh, 9:30.

5 (Whereupon, the proceedings were
6 concluded at 6:29 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22